No. 305.

305

FILED
OCT 3 1898
JAMES H. McKENNEY
CLERK

In the Supreme Court

Brf. of Dixon & Toole for P. E. C.

OF THE

United States.

Filed Oct. 3, 1898.

OCTOBER TERM, 1898.

CHARLES MAYGER and the ST. LOUIS MINING & MILLING COMPANY OF MONTANA,

Plaintiffs in Error,

vs.

THE MONTANA MINING COMPANY, LIMITED,

Defendant in Error.

On Motion to Dismiss.

In Error to the Supreme Court of the State of Montana.

ARGUMENT AND AUTHORITIES OF PLAINTIFFS IN ERROR IN REPLY TO BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS.

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Taking the statement of defendants in error, as to the pleadings to be correct, the statement of facts seems to be incomplete in this: The denial that defendant company ever succeeded to any interest of the locators of the Nine Hour

Lode claim, if they ever had any, of course required some *legitimate* evidence that it did acquire such interest. The question is what interest, if any, did the *Montana Mining Company* (*limited*) acquire under the deed from Bayliss to the Montana Company, and by the deed from the Montana Company to it, as no other title is asserted or could be maintained under our Statute of Frauds without being pleaded. Objection and exceptions to the admission of these deeds was duly made and saved. These deeds will be found on pages 73 original, 34 print; 74 original, 35 print.

The pleadings admit and the case was tried upon the theory that the "thirty foot strip" was excepted out of the Nine Hour patent, and included in the St. Louis patent. Hence the title of the Montana Mining Company (limited) under its deed became a material matter, and the question as to the right to enlarge the grant according to the calls in the deed a controlling one. We mention this in connection with the claim that the appeal is taken for delay. As we understand it, if this court takes jurisdiction on account of a Federal question being involved, it will consider all errors properly assigned, which are decided upon common law principles and not controlled by interpretations given the local statutes.

Is there a Federal question involved?

The many arrogant expressions and violent assumptions made by counsel for defendant in error in their brief will be passed without further notice.

It never was claimed, and is not claimed, that there is any *express* prohibition against the transaction involved in the

agreement and presented in the record. The question is one involving the construction of the law applicable to the entry and *patenting* of a quartz lode mining claim, and the *point is* whether the agreement and transaction is one contrary to the *policy* of that law, and if it is, this court on account of its Federal jurisdiction, must finally determine it. Hence we claim that none of the decisions cited by counsel for defendants in error have any direct bearing upon the main question involved.

When an agreement is contrary to *express* law, especially in cases where congress alone under the constitution can make primary disposition of the public domain, and has done so, the mode is a condition precedent, and any other is against the public policy of its laws. This is axiomatic, as nothing else can be effectual to divest the title.

And so it is; the real question presented is whether a different mode of disposing of the title involves a Federal question. The pursuance of the *bare* form when the facts pleaded and proofs introduced show that it has no real foundation does not satisfy the law so as to warrant a court of equity in enforcing a contract,which in terms dispenses with the *conditions* and *objects* of the mode provided. The contract, as pleaded and proven, is contrary to the policy of the law.

Kennet vs. Earle, 27 Pac., 735, is in point. The provisions of the Statutes of the United States bearing upon this question are found in the following sections. All plaintiff in error was entitled to a patent for, was what it or its predecessor had lawfully located, and by the agreement it was to acquire more:

Section 2319, R. S. U. S., expressly provides that titles shall be acquired "under regulations prescribed by law."

And *right of possession* depends upon compliance with the laws. (Sec. 2322.)

The location must be distinctly marked upon the ground so that its boundaries can be readily traced. (Sec. 2324.)

Must have been properly located to obtain a patent. (Sec. 2325.)

If no adverse claim is filed, it shall be assumed that none exists. (Sec. 2325.) Here one was filed, and the contract sought to be enforced was made the basis of its withdrawal. The party adversing was required to bring suit and to prosecute it to final determination, to try his right of possession, and his failure to do so is a *waiver* of his adverse claim. Here he proposes not to waive it, but enforce it by agreeing that one may acquire a patent which he shows was not under the law entitled to it. (Sec. 2326.)

Only party entitled to possession shall have a patent. Here it is shown that under pleadings, proof and finding, the party to procure the patent under the contract was never in or entitled to possession. (Id. 2326.)

If neither had a valid location the court should have so found. (Supplement R. S. U. S., p. 324.) Here the court by the contract was prevented from investigating this matter, and one is conceded to have secured a patent under the contract who was not entitled to it.

The contract of the predecessor in interest of defendants

in error, as shown by the contract, pleadings and findings, contemplated perjury on the part of the plaintiffs in error, according to the theory of defendants in error.

Anderson vs. Carkins, 135 U. S., bottom p. 489, top 450.

Upon the proposition that the contract relied upon and the facts pleaded are contrary to the policy of the mining laws referred to, we cite the following decisions and authorities:

Hannay vs. Eve, 3 Cranch, 242.
Dial vs. Hair, 54 Am. Dec., 176.
Drexler vs. Tyrrell, 15 Nev., 114.
Smith vs. Applegate, 25 N. J. L., 352.
Sharp vs. Tees, 4 Hals., 352.
Pratt vs. Adams, 7 Paige, 615.
Tatum vs. Kelly, 25 Ark., 209.
De Groot vs. Van Duzer, 20 Wend., 390.
Mitchell vs. Cline, 84 Cal., 409.
1 Pom. Eq. Jurisp., Sec. 40.
Miller vs. Ammon, 145 U. S., 421.
Grey vs. Reynolds, 21 N. Y., 771.
Swanger vs. Mayberry, 59 Cal., 91.
Ladda vs. Hawley, 57 Cal., 51.
Mitchell vs. Smith, 2 Am. Dec., 417.
Boyd vs. Barclay, 34 Am. Dec., 762.
Bank of Michigan vs. Niles, 41 Am. Dec., 575.
Bell vs. Leggett, 7 N. Y., 176.
Kennel vs. Chandler, 14 Hun., 39.

Connolly vs. Cunningham, cited in Greenhood on Public Policy, 446.

George vs. Proctor, 66 Led., 240.

There are also various other authorities bearing upon the same propositions to which we refer the court:

Damrell vs. Meyer, 40 Cal., 166.
Hudson vs. Johnson, 45 Cal., 21.
Auston vs. Walker, 47 Cal., 484.
Bull vs. Shaw, 58 Cal., 455.
McGregor vs. Donelly, 67 Cal., 149.
Spence vs. Harvey, 22 Cal., 337.
County Lodge vs. Gray, 98 Ind., 288.
U. S. vs. Trinidad, 137 U. S., 160.
Kreamer vs. Earl, 91 Cal., 112.

As the constitution confers upon congress *alone* the *power* to make primary disposition of the public domain, and it has assumed to do so and prescribed the *mode* of its exercise, the mode becomes a part of the power. In other words, both the right and remedy are conferred, and in such case the remedy is exclusive.

By *express law* it has prescribed the mode of *acquiring* and *preserving* a possessory right to a quartz lode mining claim, and no other mode can be employed. It has in equally emphatic terms provided the mode by which this possessory right may be merged into a title in fee by the execution of a United States patent. Having the *jus disponendi* of the *fee*, and having prescribed the mode by which it is to be divested

of that character of title, it is exclusive of all others. Congress in such case is the sole judge as to the necessity of the law it enacts, and many good reasons might be assigned for closing the doors for possible frauds, as it has done.

If there had been a sale or transfer by compromise or in any other proper mode by which the possessory title, shown clearly by the pleadings of defendant in error, to be in their predecessor, then the law recognizes such sale and transfer and authorizes the issuance of the patent to the grantee. But this is not the case here, the transaction is incomplete, and the authorities cited by solicitors for defendent in error are consequently inapplicable.

The inherent infirmity of the contract is the question to be determined. Defendant in error is seeking to enforce its specific performance, when it shows that the grantor in the patent never had the possessory right to the mining claim, and no right under the express, *i. e.*, exclusive provisions of the law to a patent. It is the vicious provisions of the agreement, therefore, that one in no way entitled to a patent shall get it and convey it to another, by withdrawing the adverse claim, and then asking a court of equity to consummate the scheme by a specific performance of the contract, that was complained of. Congress evidently had good reason for prescribing the *particular* mode by which the government was to be divested of the fee to a quartz lode mining claim, and in prescribing the *conditions precedent* upon which a patent should issue, and thereby shut out any other made by the agreement or collusion of any one. If then, under the showing made by defendant in error, by the allegations in the

pleadings and proof and the findings as shown by the record, the agreement is contrary to express legislation of congress, it is against the policy of the law, and a court of equity will not aid in enforcing it. If this position is maintainable, or deserves a further hearing than a motion of this kind affords, we respectfully submit that on account of the manifest errors as shown by the record, it should be overruled, there being no statute of the state controlling the questions ruled upon, and consequently no binding decision of its Supreme Court.

Teal vs. Walker, 111 U. S., 242

The same doctrine of construction announced the interpretation of an express statute of a state by its highest judicial tribunal, and respected by this court in Teal vs. Walker, *supra*, upon questions of the policy of its laws, would make the proposition here presented in the interpretation of the laws of the United States in reference to the policy thereof, a Federal question. The question is not whether the transaction was expressly prohibited, but whether it is contrary to the policy of the law as expressed.

Whilst the law favors a compromise of litigation and makes it a valid consideration for an agreement, yet, if the terms of the compromise should be contrary to the policy of the law, another principle entirely would be involved; and the question as to whether or not the agreement was contrary to such policy would be a matter of more importance in determining the rights of the parties under it than the question of compromise. The policy of the mineral land law is to allow a patent

where there is a valid location. The same policy imposes a duty upon an adverse claimant, after application for a patent, to litigate his adverse claim, when he claims any right under it. It is the means of preserving and protecting this policy. He may abandon his adverse claim, and thereby concede to his adversary the necessary compliance with the law so as to enable him to obtain his patent. But, in the absence of this concession, when he combines with him so as enable him to obtain a patent, when he could not otherwise have obtained it, as is shown by the complaint, and, under such circumstances, retains by contract a benefit or interest in the patented lands thus acquired, his contract is contrary to the policy of the law, and therefore incapable of being specifically enforced in a court of equity. It would seem that under the sections of the statute of the United States with reference to the interposition of adverse claims, where he proposes to retain an interest in or benefit from the property sought to be patented, it is his duty to litigate his rights. That it is the policy of the land laws that these rights shall be litigated or abandoned is made still more manifest by the statute that requires the court to reject the claim of both when neither has complied with the law, and thereby defeat the issuance of a patent to either. If it is apparent by the combination between the parties that this result would be avoided, and that one of the parties would obtain the patent to the land, to which he is not entitled, it is certainly contrary to the policy of the law. Here the adverse claimant has not litigated his claim and shown his right to a patent, nor has he defeated the application, but still retains his claim and combines with

the applicant in getting a patent, when he knows such applicant was not entitled to it, and in this way the operation of the statute as intended is defeated and a patent granted to one where it either should have been granted to the other or to neither party. This transaction destroys the mode of ascertaining by the judgment of the court whether either party is entitled to a patent, and permits a combination by which a decree of court is obtained, which decree is itself made conclusive upon the Land Department in issuing the patent. If he abandons his right, the application is, in a proper sense, thenceforward ex parte, and the government alone could defeat the legal title acquired by the patent. When the combination exists and the adverse claimant is still the beneficiary, it is not ex parte in a proper sense, but the applicant is seeking to obtain a title he concedes he is not entitled to, and the adverse claimant is claiming a right under the patent, not according to the policy of the law, and through one whom he also asserts has no title to it. Such a combination, therefore, would seem to result in obtaining a patent contrary to the policy of the statute, and a contract by which either the one or the other is to reap a benefit, derived from such a combination, ought not to be specifically enforced in equity. An offensive combination to accomplish this constitutes the gravamen of the question as being against public policy rather than the injuries that may or may not result from it. Indeed, the court will look into the contract no further than is necessary to see whether it contravenes public policy of the statute, and if it does, deny the relief sought. A combination of the parties by which one is to secure a patent, who, under the policy of

the law is not entitled to it, is no more to be tolerated than the connivance between a husband and wife for the purposes of a divorce. Where the combination in the one case and the connivance in the other is shown, the action must fall. Respondent can not combine in this way with the applicant and assist in securing to him a patent, which depends upon a valid location, and afterwards be heard to assert that the location is invalid, which he in substance must do here. By withdrawing his adverse claim he assured the government that he had no valid claim, and enabled his adversary to obtain a title upon the faith of a valid location, which carried with it possession and the right of possession, and he cannot gainsay either. Nor can he avail himself of the benefits of a contract which would allow him such a privilege. The object of his action now is to regain the possession, or show to the court that the applicant never was in possession, which he could only do by litigating his adverse claim. The applicant could not obtain a patent while he was in possession, which followed a valid location which is alleged to have been in the Nine Hour claimants, and he cannot relinquish such possession to enable the applicant to do so, and after it is done come into court and say, "I have always been in possession," which he is now trying to. Respondent pleads the facts which, in law, estops it, and on the motion of the court, or suggestion of any one, it is called upon to uphold the law which defeats one who has followed it in the showing sought here to be made. The possession and right of possession of the applicants for a patent to the St. Louis Lode Claim was essential and necessary to obtain a patent for it. Respond-

ent's predecessors in interest come into court now and claim the invalidity of the location and possession of the applicant for the St. Louis patent, to avoid the operation of the statutes of limitation. They must then have, therefore, assured the possession of the predecessors in interest of the applicants for the patent, which is the essential element to obtain the patent. If they claim that they were in possession as locators entitled to possession, and have lawfully been in possession since the location of the thirty-foot strip, they cannot then assert that by reason of the combination or agreement with the applicants to the patent, the government was deceived and induced to grant a patent contrary to the laws by which they were issued, because, in such case, public policy will not permit them to avail themselves of such an agreement. And so it is; by the allegations of the complaint it is shown that their possession and right of possession during all the proceedings in obtaining a patent was to avoid the result of the statutes of limitation, and they have thereby entailed upon themselves an equally fatal result in aiding in the consummation of a scheme contrary to the policy of the statute, and equity will not allow them to enforce the scheme and receive the contemplated benefits from it.

As suggested, the compromise of a lawsuit ordinarily affords a consideration to uphold it, as the policy of the law abhors litigation. But when the purpose and result of the compromise is to defeat the policy of the law,—we may say even the plain provisions of the law,—the consideration is tainted, and its enforcement will be discouraged rather than justified in a court of equity. So that the main question raised

in the motion for a non-suit involved in this proposition is whether or not the contract is void as against the policy of the law.

It is manifest from the allegations contained in the complaint, and from "Exhibit A," which is made a part of it, as well as from all the testimony touching upon those propositions, in so far as the showing of defendants in error is concerned, that their alleged predecessors in interest in obtaining a patent to the thirty-foot strip, to which they were not entitled, and which they could never have obtained except by the agreement set forth, were for this reason, among others, we insist, transactions contrary to the policy of the law, and ought not to be enforced.

Whatever may be the presumption in a court of laws, as to the compliance of the grantee with the requirements of the law, in this suit in equity it is shown by defendant in error that no such compliance was had, and that the law was circumvented by means of the very agreement it is seeking to have specifically enforced. Under such conditions, we respectfully submit that the transaction is contrary to the object and policy of the Mineral Land Law of the United States, that a Federal question is presented, and that *the scheme* should not be consummated by specific enforcement.

Was the writ sued out for delay? If there is any merit in the Federal question presented, it is conclusive against the right of defendant in error, under the showing it makes, to a specific performance, which is inconsistent with any theory that the object was delay.

Attorneys for defendants in error, in their argument, p. 14, make the violent assumption that because plaintiffs in error availed themselves of all the time allowed by the state statute to prepare their statement on motion for a new trial, and bring it to a hearing, that this court will entertain this fact as evidence of an intention to delay. The very object of statute in fixing a period within which these things were to be done was to obviate all objection on account of laches and to place the party in that respect upon the same footing as if the acts had been done at the earliest possible moment. If there was any inexcusable delay, in this, as claimed, it should have been urged in the trial court, and not here.

Section 1174, Code of Civil Procedure of the State of Montana, provides: "The application for a new trial shall be heard at the earliest practicable period, * * * and may be brought to a hearing upon motion of either party."

Any of these matters could have been called up in the trial court, by either party, and if not done it will be assumed in the absence of a showing to the contrary, that good reason existed for not doing so.

Aside from the question heretofore discussed, a reference to one fatal error, besides others disclosed by the record, will suffice, we think to satisfy the court that the appeal is not frivolous.

The complaint and "Exhibit A," made part of it, shows that the thirty-foot strip involved in this contention was included in the survey, application for patent, and patent issued for the St. Louis Quartz Mining Claim, and that the same was

lopped off of the adverse claim and not included in the patent to the Nine Hour Quartz Mining Claim. That there was error, therefore, in admitting the patent to the Nine Hour claim, as a muniment of title in this action, would seem too manifest to require argument or the citation of authorities.

The *injury* occasioned by this error, which was the entering wedge to the admission of the mesne conveyance to the defendant in error, will become apparent when the calls of the deeds constituting the mesne conveyance are carefully examined. The deeds preceding the one to Bratnober refer in general terms to the Nine Hour Lode claim. But *in so far* as defendant in error's claim under the *deeds* is concerned, it is only necessary to see what has been conveyed to it. Bratnober's deed to Bayliss was for the "Nine Hour Lode, the *same being* Lot No. 63, Township 11, North of Range 6 West, according to the United States Government survey thereof," as will be seen by reference to the record, page 34. The deed from Bayliss to the Montana Company (Limited) calls for "that certain other quartz lode mining claim called the Nine Hour Lode Claim, the same being designated in the United States patent therefor as lot No. 34. In the conveyance from the Montana Company (Limited) to respondent the same description is employed, all conforming to the description contained in the patent. (See record, p. 34.) That these conveyances were considered by the learned judge who tried the case, will clearly appear from finding 8, record, page 93. This finding forms one upon which the decree was entered, and this court, according to all precedent, if the evidence was incompetent, will not assume to say what would have been the result had

the objection to its admission been sustained. The question, then, is fairly presented, whether, under the calls in these deeds and patent of the Nine Hour Lode, they could by oral evidence include the thirty-foot strip in question, embraced in the patent to the St. Louis Lode, so as to make them competent evidence on the trial of this case. That the objection to this testimony should have been sustained, we cite the court to the following authorities:

Taylor vs. Holter, 1 Montana, 685.
3 Washburn, R. P., 4 Ed., 404 and 424.
Alabama vs. Montague, 117 U., S., 611.
Patentee vs. N. P. R. R. Co., 134 U. S., 163.
Waldin vs. Smith, 39 N. W., 82.
Thayer vs. Finton, 15 N. E., 615.
Mendel vs. Whiting, 31 N. E., 431.
Thaxter vs. Turner, 24 Atl., 829.
Young vs. Cosgrove et al., 49 N. W., 1040.
Muldoon vs. Deline, 135 N. Y., 150.

These authorities are also conclusive as to the inadmissibility of all the testimony tending to show an intention to include the thirty-foot strip in said deeds, to which we have heretofore referred.

For this manifest error of the court, we insist this case should be reversed. They are also conclusive against all the other deeds conveying the Nine Hour Lode claim.

Carson City, &c., vs. North Star, &c., 73 F., 599.

But, as we have before suggested, if it was true that all

the deeds of conveyance to the predecessors of Bratnober included the thirty-foot strip in the designation Nine Hour Lode Claim, yet the deeds from Bratnober to Bayliss and Bayliss to the Montana Company Limited, and the latter to respondent, and the deeds to respondent are limited to the Nine Hour *as described* in the Nine Hour patent, which does not include the thirty-foot strip, and which cannot be made by proof *aliende* to do so, it logically follows that all these deeds, mortgages, etc., were likewise incompetent. Suppose all the conveyances to Bratnober included the thirty-foot strip, and Bratnober, as we have seen, never conveyed it, and in a suit by a successor in interest (having, perhaps, an action to reform the deeds), are not all these deeds incompetent in respect to the question of title to the thirty-foot strip? The answer, we claim, must be in the affirmative.

Respectfully submitted,

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